No. 79-337

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

STATE OF ILLINOIS

Petitioner,

vs.

JOHN J. TROLIA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST JUDICIAL DISTRICT

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CITATIONS

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Your Petitioner, the State of Illinois, respectfully prays that a Writ of Certiorari issue to review the judgment of the Illinois Appellate Court, First Judicial District, entered on February 23, 1979, which reversed the Respondent's conviction for murder and remanded the cause for a new trial.

OPINIONS BELOW

The opinion of the Illinois Appellate Court, First Judicial District, is reported as *The People of the State of Illinois* vs. *John J. Trolia*, at 69 Ill. App. 3d 439, 388 N.E.2d 31 (1979), and it is set forth herein as Appendix A.

JURISDICTION

The opinion of the Illinois Appellate Court, First Judicial District was entered on February 23, 1979. A timely Petition for Leave to Appeal to the Illinois Supreme Court was denied on May 31, 1979. (Appendix B)

The jurisdiction of the Supreme Court of the United States to hear this case on Writ of Certiorari is invoked under 28 U.S.C. § 1257(3), since Respondent raised the issue in the trial court in his post-trial motions and specifically argued in the Illinois Appellate Court, First Judicial District, that he was denied his constitutional right to due process of law. Moreover, the decision of the Illinois Appellate Court, First Judicial District, is predicated upon a finding of a violation of Respondent's due process rights.

QUESTION PRESENTED

Whether the failure of the prosecution to disclose a witness' statement, which was unknown to the prosecution and was not discovered until weeks after Respondent's conviction, violated Due Process, when the Respondent made only a general pre-trial discovery request and the trial court, applying the standard of materiality, found, after its first hand appraisal of the entire record, that there was no reasonable doubt as to the Respondent's guilt whether or not the omitted evidence was considered.

CONSTITUTIONAL PROVISIONS

The Fourteenth Amendment to the Constitution of the United States provides:

> "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

* * *

STATEMENT OF THE CASE

A.

General Background

Following a jury trial, on May 11, 1976, John Trolia was found guilty of the September 1, 1974 murder of Paula Popik. He was sentenced 25 to 75 years in the Illinois State Penitentiary.

Prior to trial, Trolia filed discovery pleadings, which included the following request:

> "That the prosecution disclose to the defense the names and addresses of any witness or witnesses that may be or would be favorable to the defense. These witnesses to be clearly and separately identified on the List of Witnesses. The same disclosure is requested of any physical evidence or scientific evidence that might be or would be favorable to the defense."

Popik worked as a bartender at the Godfather Lounge. On the night of August 31, 1974, she came to work dressed in black hot pants and a halter top, no nylons and black, high heeled shoes. She wore a butterfly decal on her waistline. Sometime between 9:30 and 11:00 P.M. she ate a hot dog on a sesame seed bun and she left work at 3:30 A.M., September 1st. Between 4:30 and 5:00 A.M., September 1st, she was seen at the On The Rocks Lounge. Later, at approximately 6:20 A.M., Popik's car was found burnt; and on September 6th, her body was found floating in the river. When the body was pulled from the river, it was naked except for a black halter top around the neck, black, high heeled shoes and a butterfly decal on the waist. The cause of death was a bullet wound to the head.

A pathologist testified at trial that the post-mortem changes he observed in the victim's body normally appear in 5

to 6 days, although water temperature will affect this time period. An examination of the victim's stomach revealed partly digested food, containing some seed like particles.

Richard Maskas testified at trial that he saw Trolia at On The Rocks on August 30, 1974, and that Trolia asked for "something he could use," because people were looking for him. Maskas loaned Trolia a loaded 4-shot Derringer. A few days later Trolia returned the empty gun and told Maskas the gun could be "hot." Several days later Trolia told Maskas the gun was used in a murder, and that he had shot a man and a woman.

A firearms examiner stated that Maskas' Derringer could have fired the bullet which killed Popik.

Linday Szilagyi, a waitress at On The Rocks who knew Trolia for approximately 2 years, stated that she saw Trolia in the lounge on September 1st about 5:00 A.M. with a girl matching Popik's description, and that Trolia later arrived at Szilagyi's apartment alone about 6:30 A.M. About 2 weeks later, Szilagyi recognized a picture of Popik in the newspaper as the girl with Trolia the morning of September 1st. She also testified that her apartment was 2 blocks from the location where Popik's car was found burnt. Szilagyi admitted at trial that she initially lied to the police, saying she knew nothing, because she did not want to get Trolia in trouble.

Thomas O'Neill, the common law husband of Szilagyi, testified that on September 1st Trolia asked him for an alibi for the previous night and that morning. Later in the week, O'Neill was at On The Rocks with Robert Holwell and Trolia, when Trolia explained that on the morning of September 1st, Trolia shot a Mexican and a girl, threw the girl's body in the river, got rid of the car, and then went to O'Neill and Szilagyi's apartment. Subsequently, when O'Neill informed Trolia in Holwell's presence that he would not act as an alibi, Trolia confessed to both men that he had only killed a girl. O'Neill admitted in his testimony that he had initially denied any knowledge of the incident to the police.

Robert Holwell testified and substantiated O'Neill's testimony. As did O'Neil, Holwell admitted that he initially lied to the police.

Paula Popik's brother, James Popik, stated that after he learned on September 2nd of Paula's car being burnt, he called other family members, friends of Paula's, and Paula's place of employment in an attempt to locate her. He was unsuccessful in finding her.

Trolia testified in his own behalf. He denied all the accusations and testimony against him and gave a detailed account of his activities the night and morning of August 31-September 1st. He initially stated that he thought he began the evening by attending a wrestling match at the White Sox Ballpark; and he then continued with a detailed account of his activities. After rebuttal evidence was presented, however, showing that no wrestling match was held the night of August 31st, but that one was held September 7th, Trolia admitted on sur-rebuttal that the activities to which he had earlier testified occurred the night of the wrestling match and not the night of August 31.

B.

Facts Material To The Question Presented

Following the jury's verdict, Trolia subpoenaed all the reports from the various suburban police departments, which were involved in the investigation of the Popik murder. Among these reports, there was a statement of Rebecca Lavin, taken on September 6, 1974, wherein Ms. Lavin stated that she saw Paula Popik on September 3, 1974, in the Godfather's Lounge. This statement was taken by Investigators Vanerio and Houlihan. Ms. Lavin was not named on the People's list of witnesses and her statement had never been referred to in any of the People's answers to discovery. Based upon this statement, Trolia motioned for a new trial.

The People filed a response to Trolia's motion, supported with numerous affidavits. Affidavits from the three Assistant State's Attorneys involved in the case stated that they had no prior knowledge of Ms. Lavin's statement, and no knowledge that Investigators Vanerio and Houlihan were involved in the investigation. Pat Castallaneta, an owner of the Godfather Lounge, attested in an affidavit that he was at the lounge the entire evening of September 3rd, that James Popik came to the lounge looking for Paula, and that Paula Popik was not in the lounge that evening. James Popik attested that he went to the lounge September 3rd, that he informed both patrons and employees Paula was missing, that Paula was not at the lounge that evening, and that no one in her family had seen her after September 1st. Ralph Willer, an investigator for the Cook County Sheriff's Police, attested that he contacted Ms. Lavin on June 2, 1976, and she was unable to recall whether she spoke to Ms. Popik on the evening of September 3rd.

A hearing was held on Trolia's motion and it was denied. The trial judge opined that he did not see how Ms. Lavin's testimony "would really add a great deal." A specific finding was subsequently entered by the trial judge where he stated, "I find that Rebecca Lavin's testimony, the affidavit and the testimony conflicts in such a way with the physical facts that it would not create a reasonable doubt as to the guilt of the defendant, specifically but not limiting it to—because I don't have the complete transcript—but the fact that the car was missing, the car was burned on the morning that was stated. Certainly that physical fact is not disputed. The family was looking for the deceased, the deceased was found wearing the same clothes she was wearing the night just before, when she was last seen by other witnesses, and based on the entire evidence, I would find that her testimony would not create a reasonable doubt."

Trolia argued in his post-trial motions before the trial court that the nondisclosure of Lavin's statement violated his right to due process of law. In his appeal to the Illinois Appellate Court, First Judicial District, Trolia specifically argued as an issue on appeal that this nondisclosure violated due process.

REASON FOR GRANTING THE WRIT

THERE WAS NO DENIAL OF DUE PROCESS BY THE PROSECUTION'S FAILURE TO DISCLOSE A WITNESS' STATEMENT, WHICH WAS UNKNOWN TO THE PROSECUTION AND NOT DISCOVERED UNTIL WEEKS AFTER RESPONDENT'S CONVICTION, WHEN RESPONDENT MADE ONLY A GENERAL PRE-TRIAL REQUEST FOR DISCOVERY AND THE TRIAL COURT, APPLYING THE PROPER STANDARD OF MATERIALITY, FOUND AFTER ITS FIRST HAND APPRAISAL OF THE ENTIRE RECORD THAT THERE WAS NO REASONABLE DOUBT AS TO THE RESPONDENT'S GUILT, WHETHER OR NOT THE OMITTED EVIDENCE WAS CONSIDERED.

In *Brady* v. *Maryland*, 373 U.S. 83, 87, 10 L.Ed.2d 215, 218, 83 S.Ct. 1194 (1963), this Court established the principle that the suppression of evidence "favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."

In *United States* v. *Agurs*, 427 U.S. 97, 49 L.Ed.2d 342, 96 S.Ct. 2392 (1976), this Court again considered the issue of whether a defendant was deprived of the right to a fair trial and due process by the failure of the prosecution to disclose evidence, which the defendant maintained was favorable to her defense. In *Agurs*, the defendant and the victim checked into a motel as man and wife. The victim carried two knives on his person. According to the testimony of the victim's enstranged

wife, the victim had $360 in cash. Approximately 15 minutes after checking into the motel, employees heard the defendant screaming for help. Upon entry into the room, the victim was found on top of the defendant struggling for possession of a knife. Defendant held the knife and the victim was grasping the exposed blade. The motel employees separated the two and called the police. The defendant left before the police arrived. Circumstantial evidence indicated that the victim and the defendant had engaged in sexual intercourse, that the victim had left the room to go to the bathroom down the hall, and that the fight occurred upon his return. The contents of the victim's pockets were found scattered on the dresser, but no money was there. The defendant surrendered to the police the following day. A physical examination of the defendant revealed no cuts or bruises. However, an autopsy of the victim disclosed several deep stab wounds in his chest and abdomen, and numerous slashes on his arms and hands, which were characterized as "defensive wounds." At trial, the defendant offered no evidence. She maintained that the victim attacked her and that her actions were taken in self defense. The jury returned a guilty verdict in 25 minutes.

Three months after the conviction, the defendant moved for a new trial. Defendant argued that newly discovered evidence revealed that the victim had a police record, which would have been further evidence of his violent personality, and that the prosecution had failed to disclose this information. Prior to trial, the defendant had made no request for discovery of this information.

In considering the issue raised, this Court recognized three distinct situations in which the rule enunciated in *Brady* v. *Maryland*, 373 U.S. 83, 10 L.Ed.2d 215, 83 S.Ct. 1194 (1963), applies. The first situation occurs were the undisclosed evidence demonstrates that the case against the defendant includes perjured testimony and the prosecution knew, or should have known, of the perjury. A conviction resulting from the use of such testimony is, the Court found, fundamentally unfair and

must be set aside if there is any reasonable likelihood that the perjured testimony could have affected the jury's verdict. In this type of case, a strict standard of materiality must be applied, not merely because of prosecutorial misconduct, but more importantly, because there is a corruption of the truth seeking function of the trial process.

The second situation is typified by *Brady* v. *Maryland*, where there is a pretrial request for specific evidence which is suppressed. An analysis of the decision in *Brady* shows that "implicit in the requirement of materiality is a concern that the suppressed evidence might have affected the outcome of the trial." *United States* v. *Agurs*, 427 U.S. at 104, 49 L.Ed.2d at 350. The test of materiality in this type of situation is whether the evidence might have affected the outcome of the trial.

The third type of situation is illustrated by the case where no request for discovery is made, or where a general request is made for "anything exculpatory." This last situation is seen in the *Agurs* case.

In *Agurs*, this Court reiterated its previous holding that there is " 'no constitutional requirement that the prosecution make a complete and detailed accounting to the defendant of all police investigatory work on a case,' " since "[t]he mere possibility that an item of undisclosed information might have helped the defense or might have affected the outcome of the trial, does not establish 'materiality' in the constitutional sense." 427 U.S. at 109-110, 49 L.Ed.2d at 353. Moreover, this Court noted that the constitutional obligation of disclosure is not measured by the moral culpability or the wilfulness of the prosecution, for "[i]f the suppression of evidence results in constitutional error, it is because of the character of the evidence, not the character of the prosecutor." 427 U.S. at 110, 49 L.Ed.2d at 353. A prosecutor's constitutional obligation to

disclose exculpatory evidence is governed by the standard of materiality. In that regard, this Court stated:

> "The proper standard of materiality must reflect our overriding concern with the justice of the finding of guilty. Such a finding is permissible only if supported by evidence establishing guilt beyond a reasonable doubt. It necessarily follows that if the omitted evidence creates a reasonable doubt that did not otherwise exist, constitutional error has been committed. This means that the omission must be evaluated in the context of the entire record. If there is no reasonable doubt about guilt whether or not the additional evidence is considered, there is no justification for a new trial." 427 U.S. at 112-113, 49 L.Ed.2d at 354-355.

In expressing this standard and the importance of viewing the new evidence in light of the entire record, this Court gave the following example in a footnote:

> "If, for example, one of only two eye-witnesses to a crime had told the prosecutor that the defendant was definitely not its perpetrator and if this statement was not disclosed to the defense, no court would hesitate to reverse a conviction resting on the testimony of the other eye-witnesses. But if there were fifty eye-witnesses, forty-nine of whom identified the defendant, and the prosecutor neglected to reveal that the other, who was without his badly needed glasses on the misty evening of the crime, had said that the criminal looked something like the defendant but he could not be sure as he had only had a brief glimpse, the result might well be different. 40 U. Chi. L. Rev. Supra, n 10, at 125." 427 U.S. N.21 at 113, 49 L.Ed.2d N.21 at 355.

In *Agurs*, the Court rejected the suggestion that the prosecutor has a constitutional duty routinely to deliver his entire file to defense counsel, and accordingly it held that it could not consistently treat every nondisclosure as though it were error. It necessarily followed, therefore, that the judge should not order a new trial every time he is unable to characterize a nondisclosure as harmless error under the customary harmless error standard. Rather, the judge must apply the standard of materiality, namely, if there is no reasonable doubt about guilt whether or not the omitted evidence is considered, there is no justification for a new trial. Although the defendant in *Agurs*, was tried before a jury, as was the respondent here, this Court affirmed the trial judge's evaluation of the significance of the undisclosed evidence in the context of the entire record and his first hand appraisal of that record, finding that, even considering the new evidence, there was no reasonable doubt of the defendant's guilt.

As was done by the trial judge in *Agurs*, the Judge, who presided over the respondent's trial, considered the omitted statement in the context of his first hand appraisal of the entire record and found it insufficient to raise a reasonable doubt as to respondent's guilt so as to justify a new trial. The Judge found that Lavin's statement conflicted with the physical evidence that the victim's car was found burnt the morning of September 1, that the victim's family had been searching for her from that date, and that the victim was found dead wearing the same clothes she wore the night she was last seen. Considering these facts, but not limited thereto, the Judge correctly found the omitted evidence did not create a reasonable doubt as to guilty. A review of the facts presented herein confirms that his decision was proper.

In its opinion, the Illinois Appellate Court, First Judicial District, clearly ignored the proper standard of materiality and side-stepped the application of this Court's decision on the construction of due process by distorting common sense and the normal and customary usage of the English language to term the respondent's discovery request a specific request, as illustrated in *Brady*.

In speaking of the effect of the nondisclosure of evidence on a defendant's due process right, this Court in *Agurs* referred to the *Brady* case and stated that "[i]n *Brady* the request was

specific. It gave the prosecution notice of exactly what the defense desired." 427 U.S. at 106, 49 L.Ed.2d at 351. In its discussion, this Court compared the specific request in *Brady* with a general discovery request for "all Brady material" or for "anything exculpatory." *Id.*

In the present case, to term the respondent's discovery request as specific distorts common sense and the normal and customary usage of the English language. Respondent's request and the words therein are clearly synonymous with the general requested illustrated in *Agurs*, "anything exculpatory." Respondent himself used the word "any" to define what he sought, "any witness or witnesses." The word "any" by definition does not refer to a precise, definite item. Respondent's request for witnesses favorable to his defense was contained in a request, which cannot validly be termed as anything other than a general request for "anything exculpatory." In the latter part of this request, respondent asks for "any" physical or scientific evidence favorable to the defense, which distinctly shows that respondent was seeking anything exculpatory and was not seeking a precise, definite item of evidence. To accept the respondent's discovery request as specific would destroy the clear and obvious distinction between general and specific. If respondent's request is held to be specific then all requests become specific: a discovery request which asks for a precise, defined item of evidence, as a shoe, a gun, or a particular document, must then be termed a "detailed" specific request, for the definition of the word specific does not allow for comparative or superlative degrees, as "more specific" or "most specific."

Respondent's request for discovery, moreover, cannot validly be construed as specific, because it did not give notice of exactly what the defense desired, as illustrated in the *Brady* case. The respondent's request can apply to a category of witnesses consisting of one, ten, twenty or even several hundred witnesses depending on the factual circumstances of the crime.

His request, by its own terminology of "any witness" and "any physical or scientific evidence" shows that respondent was making a general request for anything that might be exculpatory and was not making a specific request. In his briefs before the Illinois Appellate Court, First Judicial District, respondent never argued or even attempted to show that his discovery request was specific. It was not until oral argument before that court, and then only in response to the People's presentation of the principles enunciated in *Agurs*, that respondent asserted his request was specific, and then he also asserted the evidence against him was perjured.

In *Agurs*, this Court gave guidance in construing a discovery request as general or specific in its comparison of the requests in *Brady* and in *Agurs*. This common sense approach has been followed by numerous federal courts. In the long litany of cases involving Lyman Moore and the State of Illinois, the Seventh Circuit Court of Appeals affirmed the District Court's denial of Moore's petition for habeas corpus, finding, *inter alia*, that Moore's request for "written statements in the possession of the prosecution, the Lansing police chief or the Chicago superintendent of police taken from any witnesses subsequent to the murder" was a general discovery request for "anything exculpatory" and was properly considered under the test of materiality set forth in *Agurs*. *U.S. ex rel. Moore* v. *Brierton*, 560 F.2d 288 (7th Cir., 1977). In *United States* v. *DiCarlo*, 575 F.2d 952 (1st Cir., 1978), the Circuit Court of Appeals found the defendant's request for "all evidence of any kind favorable," and "all statements, promises or rewards" to be general requests under *Brady*. In considering a more defined request in *Oster* v. *United States*, 577 F.2d 782 (2nd Cir., 1978), the Second Circuit Court of Appeals found the defendant's request for any material bearing on a specific prosecution witness' credibility or bias to be a general request. In *United States* v. *Palacios*, 556 F.2d 1359 (5th Cir., 1977), however, the

Fifth Circuit Court found the defendant's request to be specific under *Brady*, where the defendant requested two bullets.

This Court's opinions in *Brady* and in *Agurs*, as well as the above cited decisions, demonstrate that the Illinois Appellate Court, First Judicial District's designation of respondent's discovery request as specific is a distortion of the normal and customary usage of the English language, which avoids the application of the proper standard of materiality as enunciated by this Court.

In applying the incorrect standard of materiality, the Illinois Appellate Court, First Judicial District, placed some reliance on the appellate decision in *People* v. *Dixon*, 19 Ill. App. 3d 683, 312 N.E.2d 390 (1974). This reliance is misplaced. There, as here, the defendant made only a general request for discovery, "all persons whose testimony would be favorable." 312 N.E.2d at 392. *Dixon*, moreover, involved an entirely different factual situation. The prosecution's primary witness in a murder case was the sole occurrence witness. He testified at trial that he saw two boys exit a car and yell at the victim. As the witness ran to warn the victim, he heard a shotgun blast. Later it was discovered that the prosecution failed to disclose a statement from another man who had seen some boys on foot, but had not heard any yell, although he was close enough to the scene to have heard any yelling. There, the reviewing court found the new evidence to be material, because it reflected upon the credibility of the prosecution's only witness. Undoubtedly, the statement of the second witness was material, because it involved a one on one witness situation. The present case is completely distinguishable factually, because Lavin's statement does not dispute merely one prosecution witness, but almost every witness presented by the prosecution and all the physical evidence offered at trial. The example of factual situations given by this Court in its footnote in *Agurs*, which was quoted previously, shows the ludicrousness of comparing the present case with the facts in *Dixon*.

Dixon, accordingly, provides no guiding authority, for not only is it factually different, but it was decided 2 years before this Court's opinion in *Agurs*, wherein it set forth the constitutional principles of due process necessary for determining whether omitted evidence violates a defendant's due process rights and requires the granting of a new trial.

It is clear, therefore, that the opinion of the Illinois Appellate Court, First Judicial District, has ignored and sidestepped application of the correct principle of materiality as set forth by this Court in *Agurs*, and followed by numerous lower federal courts.

We submit that this Court should grant Certiorari, review the determination of the Illinois Appellate Court, First Judicial District, and determine in accordance with the established principle of this Court that there was no violation of the Fourteenth Amendment due process provision.

CONCLUSION

For these reasons, the Writ of Certiorari should be issued to review the judgment and opinion of the Illinois Appellate Court, First Judicial District.

Respectfully submitted,

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APPENDIX A

APPENDIX A

PEOPLE OF THE STATE OF ILLINOIS. ***Plaintiff-Appellee,*** **vs.** **JOHN J. TROLIA.** ***Defendant-Appellant.***	Appeal from the Circuit Court of Cook County Honorable **LOUIS B. GARIPPO,** Presiding.

Mr. JUSTICE LORENZ delivered the opinion of the court:

Following a jury trial, defendant was convicted of murder (Ill. Rev. Stat. 1977, ch. 38, par. 9-1) and sentenced to 25 to 75 years in the Illinois Department of Corrections. On appeal he contends that he was deprived of a fair trial by the State's failure to disclose a witness' statement which was in police possession during the trial. He also contends that he was not proven guilty beyond a reasonable doubt, and that the trial court erred when it: (1) allowed the introduction of irrelevant scientific evidence; (2) allowed a rebuttal witness to contradict him on a collateral matter; (3) prevented him from adequately cross-examining two of the State's witnesses; and (4) prohibited defense counsel from personally conducting his own voir dire examination of prospective jurors.

The following pertinent evidence was adduced at trial.

For the State

Richard "Animal" Maskas

On August 30, 1974, at approximately 5:00 p.m. he saw defendant John Trolia in the On the Rocks Lounge at 63rd and Narragansett. He had known him for six to seven months, and also knew him as "Wolfman Jack." Trolia said that some

people were looking for him and asked if he "had something he could use." He gave Trolia a small loaded four-shot derringer which he said he wanted back. Trolia gave the empty gun back to him a couple of days later and told him that he blew the shells off in the parking lot and that the gun could be hot. Several nights later, Trolia approached him in the On the Rocks Lounge and told him that he had used the gun to shoot a girl and a guy. When Maskas was arrested on September 8, 1974, in Chicago on a battery charge, he threw the gun out the window so he "wouldn't get busted with it." On September 19, 1974, he went to the Homewood Police Station with Investigator Leubscher and signed a written statement.

On cross-examination he admitted that he carried the loaded weapon he gave to Trolia concealed in his shirt pocket and that he knew that this was illegal in the City of Chicago. He acknowledged that he has been convicted of the possession of marijuana and currently has pending against him charges of theft and possession of drugs and mace. He acknowledged that after the police told him that they thought the gun was used in the killing of Paula Popik, he decided to tell them about Trolia because he "wasn't going to take the beef for someone else." He denied being under arrest for the murder of Paula Popik.

Richard Mariscal—an employee of the Godfather Lounge

On the evening of August 31, 1974, he saw Paula Popik working as a bartender at the lounge. She was wearing a dark halter top and dark "hot pants." At approximately 10:30 or later that evening he served her a hot dog on a sesame seed bun. He last saw her there at approximately 3:30 a.m.

On cross-examination, he testified that he did not notice a butterfly decal on Popik's stomach, that he did not see her dancing with anyone and that he did not see Mike McNichols or John Trolia in the lounge that night.

Maria Sizemore—a part-time bartender at the Godfather Lounge

She arrived at the lounge on August 31, 1974, at about 8:30 p.m. She and Paula Popik worked the same bar that night. She corroborated Mariscal's testimony concerning Popik's clothing and eating of a hot dog between 9:30 and 10:00. She noticed that during the course of the evening Popik spoke to a man named Mike, and danced with him while on break. Popik was standing at the door talking to Mike when she left at approximately 3:30 a.m.

Michael Herman McNichols

On August 31, 1974, he arrived at the Godfather Lounge between 11:30 and 12:00. While there he talked and danced with Paula Popik, who wore black "hot pants," a halter top, lacy sleeves, black high-heeled shoes, a small black purse and a butterfly decal on her waistline. He later saw her receive her wages in cash. Between 3:45 and 4:00 a.m. he escorted her to her car, a late model Chevrolet Nova which was parked in front of the lounge. She entered the car and drove down 111th Street until Harlem Avenue, where she turned right, going north.

On cross-examination he acknowledged that he had been drinking beer that evening, but did not know if Popik had been drinking and stated that she appeared to be sober.

Robert Sizemore, Maria Sizemore's husband

Between 4:30 and 5:00 a.m. on September 1, 1974, he saw Paula Popik sitting with another girl and two or three men at a club on 63rd Street called On the Rocks. The men were Caucasian with medium build and hair length, and one of them may have had a mustache.

On cross-examination he admitted that he did not see Popik sitting at the bar with one man, nor did he see her leave the premises.

Robert Shanklin—a doorman at the On the Rocks Lounge

At close to 5:00 a.m. on September 1, 1974, he saw defendant John Trolia at the lounge with a girl he had never seen before. The girl was a brunette, a little taller than Trolia,

wore dark clothes and "had nice legs." As she left, he said to Trolia "John, it looks like you have a live one." Trolia did not answer him. He did not see Richard Maskas in the lounge that evening.

Linda Szilagyi—a waitress at the On the Rocks Lounge

She is a divorcee and she and her three children have been living with Thomas O'Neill for four years. At approximately 5:00 a.m. on September 1 while working at the lounge, she saw John Trolia with Paula Popik. At about 5:30 a.m. Szilagyi returned home and went to sleep. About an hour later, Trolia knocked on her door. He seemed nervous and upset, and asked if he could come in. She let him in and went back to sleep. When she awoke at 9:00 a.m. O'Neill, Maskas, Trolia and her children were all there. They all had breakfast and then drove to the north side. John Trolia was her friend and often baby sat for her children. When the police asked her on December 10th whether she saw Trolia with the murder victim, she lied and said that she couldn't remember him being with any girl in particular, because she "didn't want to get Johnnie in trouble." She first told someone in authority that she had seen Trolia with Popik on February 13, 1975, when she talked to Assistant State's Attorney Michael Ficaro.

On cross-examination she denied being afraid of "Animal" Maskas and denied that he had pointed a gun at her children. She admitted that O'Neill and Maskas wanted to go to the north side on September 1 to get a drug called "T.H.C." which made Maskas "kind of rowdy."

Daniel Steimach

He lives in Summit at 5511 South 73rd Avenue approximately 25 feet northeast of the Fleetwood Roller Rink. At approximately 6:30 a.m. on September 1, 1974, he saw a small tan Chevrolet burning directly behind the roller rink and called the fire department. The firemen arrived within ten minutes.

On cross-examination he acknowledged that he did not see John Trolia anywhere in the vicinity of the burning car.

Michael B. Stoncato—a patrolman for the Village of Summit

On September 1, 1974, pursuant to a radio communication, he went to the Fleetwood Roller Rink and examined a burned-out brown Chevrolet Nova. He traced the car's license plates as being registered to a "James L. Ponik [sic]."

Phillip Lucas

At approximately 4:00 p.m. on September 6, 1974, he was in the vicinity of Route 171 and 55th Street, which is also known as Archer Avenue. As he walked over the bridge on First Avenue, he looked over the guard rail and observed what appeared to be a female body with a black rope around its neck and shoulders floating in the river. After watching the body for approximately one hour, he walked over to Archer Avenue, hailed a passing squad car, and directed the police officer to the body. He remained at the scene for a period of time and saw the body removed from the water.

On cross-examination he testified that the day in question was partly sunny with a temperature of 75 to 80 degrees. He acknowledged that the body he observed appeared to be stationary and stuck in the mud.

It was stipulated by both parties that Paula Popik's body was removed from the Des Plaines River on September 6, 1974, that it was taken to MacNeal Memorial Hospital, that she was pronounced dead at 7:00 p.m. by a Dr. Jethani, an that on the following day, September 7, a post-mortem examination and autopsy were performed on the body by a Dr. Claparols of the Cook County Morgue.

James Popik—Paula Popik's brother

He last saw his sister alive and in good health on August 30, 1974. On September 7, 1974, he went to the Chicago Ridge

Police Department to report a lost license plate. In response to a police officer's inquiry, he acknowledged that he owned a 1972 Nova. The officer told him that the car had been found burned in Summit the day before. After he contacted his father and his other sister, Karen Muller, they went to 63rd and Lawndale and made a missing persons report. On September 6, 1976, he accompanied two Sheriff's Police Investigators to the Cook County Morgue where he identified a body they brought him as being his sister Paula.

Joseph Claparols—a Coroner's Office Pathologist

He has performed approximately 800 post-mortem examinations. On September 7, 1974, he performed an internal and external examination on the body of Paula Popik. He observed skin slippage, swelling and reddening of the skin, and a high visibility of certain superficial veins caused by the putrefaction of the body that occurs several days after death. He observed lacerations around the face and neck, chief of which was a wound caused by a bullet located on the right temporal region of the head in front of the ear. He also found that there was a reddening of the left side of the external genitalia, and that a mud-like substance covered the body. In the stomach he found a moderate amount of partially digested food, including some seed-like particles. Food normally leaves the stomach within six hours, although that time may be lengthened by the person's feelings of anxiety. The putrefaction he referred to produces gas inside the body, and will normally cause a body to float sometime between five and eight days. Reddening and swelling of the skin will also normally occur after five to eight days, although it would be affected by water temperature, and would be greatly accelerated by a water temperature between 70 and 100 degrees. A water temperature of 50 to 67 degrees would not be a greatly accelerating factor.

On cross-examination he stated that he could estimate post-mortem changes as an expert, but he recalled telling defense counsel that he was not an expert at judging post-

mortem changes. He acknowledged that in the lower extremities of the body, he detected some rigidity. Under normal conditions rigidity leaves the body in a day and a half or, if the body is in water of normal temperature, in two to four days. He conceded that in water which had a warmer temperature than normal, rigidity would leave the body sooner and the body would float faster. He admitted that he did not know what a "normal temperature" for a body of water would be, and that he was not told the temperature of the river from which the body was taken. He could not recall what type of seeds were found in the victim's stomach.

It was stipulated by both parties that on August 5, 1974, and October 8, 1974, the Illinois Environmental Protection Agency took water samples from the Des Plaines River approximately one mile from where Paula Popik's body was found, and that the temperature of water on each aforementioned date was, respectively, 67 degrees and 54 degrees.

Thomas E. O'Neill—common law husband of Linda Szilagyi

On September 1, 1974, at 8:30 a.m. he was awakened when John Trolia came and asked to stay at his house. He went back to sleep and woke up again at 9:00 a.m. They all had something to eat. After breakfast, he, Trolia, and Linda and her children went up north in his car to Bob Holwell's house. As they sat around talking, Trolia told him that he needed an alibi for Saturday night and Sunday morning, and that he would talk about it more later. The following Tuesday or Wednesday, he and Bob Holwell talked to Trolia at the On the Rocks Lounge. Trolia said that he left the On the Rocks Lounge with his girl and as he was getting into the car a "Mexican popped up and [he] shot him in the head." Trolia further said that he shot the girl because she knew too much, threw her in the river, and got rid of the car. Bob asked Trolia where he got the gun. Trolia answered that he got it from Rich. O'Neill told Trolia that he would be his alibi, but later, after

talking to Holwell, told Trolia that he couldn't be the alibi and didn't want to get involved. Trolia then told him that there was no Mexican involved, just the girl. On September 19, 1974 as Trolia and Holwell left the On the Rocks Lounge, the Sheriff's police arrested them for murder. He went to the police station and spoke to an Officer Leubscher, but he didn't tell Leubscher what Trolia had said because he "didn't want to trick on him." A couple of days later, Linda showed him a newspaper article which contained photographs of Trolia and the girl who was murdered. He met with Leubscher again and denied any knowledge of the murder, but admitted that Linda had seen Trolia with "the girl" at the On the Rocks Lounge. He testified that he was called to the State's Attorney's Office on September 10, 1974. He admitted that he lied to Assistant State's Attorney Dan Pierce and Officer Leubscher when he said that he asked Trolia about the murder and Trolia told him to mind his own business. On February 13, 1975, he again went to the State's Attorney's Office and talked to Michael Ficaro because he "had to get it off my conscience." Ficaro told him that Bob Holwell had already told him everything.

On cross-examination, he denied that, on September 1, 1974, he had an argument with "Animal" Maskas or that Maskas punched and kicked things in his home. He admitted smoking marijuana on that day, and further admitted that at that time he normally drank more than twelve drinks a day. After being questioned by Officers Holt and Leubscher he signed a statement which stated that John Trolia did not tell him about the circumstances of Paula Popik's death, that he did not know of those circumstances, and that John Trolia never approached him regarding an alibi for September 1, 1974. He admitted that after signing that statement, Officer Leubscher talked to him a number of times and indicated that he could be charged with conspiracy to commit murder or some other type of crime.

David Brundage—firearms examiner for the Bureau of Identification, Department of Law Enforcement, State of Illinois

On September 11, 1974, he examined a .22 caliber projectile and a four barrel derringer and concluded that the projectile could have come from the derringer.

On cross-examination he conceded that the projectile had insufficient characteristics for a full comparison, and that he did not know whether the derringer was the gun that killed Paula Popik.

Robert Holwell

On September 1, 1974, John Trolia and Thomas O'Neill were at his house. Trolia told him that he had gotten into trouble the night before and needed an alibi. He and O'Neill saw Trolia again at the On the Rocks Lounge on September 3rd. Trolia said that on Saturday night he and a girl had left the lounge and went to her car, that a big Mexican had jumped him, that he shot the Mexican and the girl, threw their bodies in the river, burned the girl's car, and later returned the gun he used to "Animal" Maskas. Trolia later admitted to him that there was no guy involved, only a girl. Holwell subsequently told his brother, Sergeant Joseph Holwell of the Bridgeview Police Department, that he did not know anything about the murder of a girl whose body was pulled out of the river. On September 18, he told his brother that he heard that "Animal" Maskas had been picked up on a gun charge in Chicago, that this might be the gun that was used in the murder, and that Maskas had lent it out. He testified that when he was first asked questions before the Grand Jury he did not answer all questions truthfully. However, he later called his brother, who convinced him to tell the truth and not to try to protect Trolia. Afterwards, he went back and told the truth to the Grand Jury.

On cross-examination he denied that his testimony was given in exchange for the State's promise not to bring charges against him for perjury. He admitted that he was arrested for

Popik's murder himself, and that the police at that time found some marijuana he had in the vehicle that he was driving. To his knowledge he was not charged with the possession of marijuana. He conceded that because Officer Leubscher questioned him frequently he thought he was hassling him, but he denied being threatened by Leubscher.

George R. Leubscher, Investigator for the Cook County Sheriff's Police

In September, 1974, he was assigned to investigate the murder of Paula Popik. After two conversations with Sergeant Joseph Holwell of the Bridgview Police he went to the Chicago Crime Lab and found a .22 caliber derringer which was turned in pursuant to the arrest of Richard Maskas. He picked up Maskas, took him to the police station in Homewood, and told him that they knew that he owned the above mentioned gun, and that it had been used in a homicide. Maskas said that he was not going to take the heat for anyone, and that he had lent the gun to John or "Wolfman" Jack Trolia. After Maskas signed a written statement, he was released. He arrested Trolia that afternoon. He also took statements from Robert Holwell and Thomas O'Neill. He gave Trolia permission after his arrest to make a phone call to his girl friend. Trolia dialed a number and said, "They have me in jail for murder" and "They said I shot a girl in the head." Prior to that time neither he nor anyone in his presence had told Trolia that Paula Popik had been shot in the head.

On cross-examination, he acknowledged that Popik's cigarettes and lighter were found on her boyfriend's steps. He acknowledged that Trolia offered no resistance when he was arrested. He admitted that Maskas was taken into custody for questioning, but denied that he was ever charged with murder.

Daniel J. Pierce—an Assistant State's Attorney

He worked on the prosecution for the murder of Paula Popik. In February, 1975, he had a conversation with Bob

Holwell in his office. During the conversation, Holwell made a phone call. Neither he nor anyone in his presence promised Holwell anything or told him that if he did not say what they wanted to hear, he would be charged with perjury.

On cross-examination, he stated that to his knowledge, Holwell was never charged with perjury for his testimony before the Grand Jury.

For the Defense

Ronald Holt—an Investigator for the Cook County Sheriff's Police

He worked on the homicide case of Paula Popik. On September 17, 1974, he talked to Robert Sizemore who told him that on September 1, 1974, between 4:30 and 5:00 a.m., Popik had been at the On the Rocks Lounge with four or five people, including two or three males. Sizemore further told him that he did not know if Popik left with the group or with one individual, but that the entire group left at approximately 5:00 a.m.

Defendant John Trolia on his own behalf

On August 31, 1974, he went to the wrestling match at White Sox Park and then to the On the Rocks Lounge with Bob Holwell, Mickey Thomaso and Carl Calvina. At approximately 1:00 a.m. Thomaso and Calvina left the lounge. He asked Holwell for a ride home, but Holwell said he was too drunk. Holwell went outside to sleep in the car. Trolia fell asleep inside the lounge. When he woke up at approximately 2:30 a.m. he saw and talked to Linda Szilagyi and Richard Maskas. At 4:30 a.m. a man at the bar gave him a ride to Tommy O'Neill's house. Tommy left him in and asked where Linda was, and whether she was with "Animal" Maskas. He said he didn't know and didn't want to get involved. He fell asleep on the couch, and woke up around 8:00. He looked out the window and saw Richard Maskas, Linda Szilagyi and John Boyle. When Linda and O'Neill started arguing, he, Maskas

and Boyle left. They went to the "Dunkin' Donuts" on Archer Avenue, and he noticed that Maskas had over a hundred dollars. Maskas said he had "ripped off a drug dealer." Later, he, Maskas, O'Neill, Linda and her three children drove to the north side. They stopped on the way to get some wine and beer. They subsequently arrived at Bob Holwell's house in Hickory Hills. As they were driving back to O'Neill's house Maskas, who was "acting kind of crazy" because of "the dope that he had took," pulled out his derringer and pointed it at Linda's children. He had seen Maskas with that gun on numerous occasions, but denied that he ever asked to borrow it from him or that he ever had it in his possession. He babysat many times for Szilagyi and O'Neill from October until February, when he was arrested. He did not know Paula Popik, he did not see her in the On the Rocks Lounge on September 1st, and he did not kill her. He never borrowed the derringer from Richard Maskas, or told Holwell or O'Neill that he needed an alibi for September 1st, or told them that he murdered Paula Popik. In 1972 he was convicted of conspiracy to solicit to commit an armed robbery.

On cross-examination, he stated that Mr. Shankland [sic] was lying when he said that he saw him leave the lounge with Popik and when he claimed to have said, "John you've got a live one tonight."

For the State in rebuttal

Les Breen—Treasurer of the Chicago White Sox

There was no wrestling match held at the park that evening. The event held at White Sox Park on the evening of August 31, 1974, was a baseball game between the Chicago White Sox and New York Yankees.

On cross-examination, he admitted that a wrestling match was held at White Sox Park on the evening of September 7, 1974.

For the Defense in surrebuttal

Defendant John Trolia

The wrestling match he attended at White Sox Park could have been held on September 7, 1974. He remembered that in the late evening and early morning hours of August 31st and September 1st he was in the On the Rocks Lounge.

OPINION

Defendant first contends that he was deprived of a fair trial by the State's failure to disclose before trial the existence of a witness and her exculpatory statement. This statement was recovered by defense counsel through a post-trial subpoena for all police reports concerning the murder of Paula Popik. Recovered from the Police Chief of the Village of Summit was a statement taken from Rebecca Lavin at 9:00 p.m. on September 6, 1974, by Investigators James Houlihan and J. Vanerio of the Cook County Sheriff's Police. Lavin stated to them that she had known Paula Popik for six or seven months and last saw Popik on September 3rd, after 10:00 p.m. in the Godfather's Lounge in Chicago Ridge. Defendant correctly points out that prior to trial, in his motion for discovery under Supreme Court Rule 412 (Ill. Rev. Stat. 1977, ch. 110A, par. 412), he specifically requested:

> "That the prosecution disclose to the defense the names and addresses of any witness or witnesses that may be or would be favorable to the defense. These witnesses to be clearly and separately identified on the List of Witnesses. The same disclosure is requested of any physical evidence or scientific evidence that might be or would be favorable to the defense."

Defendant argues that in light of this request, the State's failure to disclose the existence of Rebecca Lavin or her statement deprived him of a fair trial, and his motion for a new trial should therefore have been granted.

In responding to this argument, the State cites and relies upon *United States* v. *Agurs* (1976), 427 U.S. 97, 49 L.Ed.2d 342, 96 S.Ct. 2392. However, we find that the State's reliance on that case is misplaced. In *Agurs*, no pre-trial request for evidence was made by defendant. The United States Supreme Court held that in such cases, or in cases where only a general request for all exculpatory matter is made, the prosecutor's constitutional duty of disclosure is violated only when any undisclosed evidence creates a reasonable doubt of guilt which did not otherwise exist. More relevant to the case at bar is *Brady* v. *Maryland* (1963), 373 U.S. 83, 10 L.Ed.2d 215, 83 S.Ct. 1194, where, as here, a specific pre-trial request was made. The Supreme Court held that in such cases, due process requires that the prosecution disclose to the accused all favorable evidence which is material to either guilt or punishment. This rule has been codified in Illinois by Supreme Court Rule 412(c) (Ill. Rev. Stat. 1977, ch. 110A, par. 412(c)), which requires that following written motion of defense counsel.

> "[T]he State shall disclose to defense counsel any material or information within its possession or control which tends to negate the guilt of the accused as to the offense charged or would tend to reduce his punishment therefor."

Through this rule, our supreme court has required that an accused receive before trial the information to which he is entitled under *Brady*. *People* v. *Elston* (1977), 46 Ill. App. 3d 103, 360 N.E.2d 518; see also Committee Comments, Ill. Ann. Stat. 110A, par. 412(c), at 681 (Smith-Hurd, 1976).

There can be no doubt that the undisclosed evidence in this case is material and "tends to negate the guilt of the accused." The State in its indictment states and through its witnesses attempts to support the charge that defendant murdered Paula Popik in the early morning hours of September 1st. Yet the undisclosed statement of Rebecca Lavin, who knew the victim, indicates that she saw her alive and well late in the evening of September 3rd, almost three days after the alleged time of the

murder. Her statement, therefore, clearly contradicts the State's case against defendant. The State concedes that the undisclosed statement was "favorable" to defendant and should have been heard by the jury. It points out, however, that the judge who presided over defendant's trial considered the undisclosed evidence at a hearing on his motion for a new trial, weighed the evidence, and concluded that it was not sufficient to warrant a new trial. The State argues that this examination of the evidence protected defendant from any prejudice its non-disclosure might have caused him, and that a new trial is therefore not warranted. We completely disagree with that argument. In *People* v. *Dixon* (1974), 19 Ill. App. 3d 683, 688, 312 N.E.2d 390, 394, in dealing with a similar situation, we stated that:

> "We do not agree that the hearing on the motion for a new trial was sufficient to render the non-production of the evidence prior to trial such that there was no violation of defendant's right of due process. The defense had a right, as noted above, to have this evidence made available to it at the time of the request. It is not this court's purpose to speculate as to what use the defense could or would have put the evidence in question, or what additional evidence it may or may not have led to, had it been turned over prior to trial. The fact remains that this evidence was not available, as it should have been, to defendant when his defense at trial was being planned and prepared. The belated turn-over of these reports after trial was sufficient to deprive defendant of their effective use and in no way cured the harm done by failing to turn them over to defendant initially."

Defendant herein was entitled upon request to have available to present to the jury all the pertinent exculpatory evidence which had been gathered. We conclude that the cure for the State's failure to comply with Supreme Court Rule 412(c) and disclose such evidence must be a new trial, rather than speculation by this or any other court as to what use or effect the evidence would have been to defendant had it been timely and properly disclosed.

In reaching the conclusion stated above, we reject the State attempt to attach importance to the apparent fact that the Assistant State's Attorneys in this case were not aware that the undisclosed statement existed and was in police possession. We note that the goal of pre-trial discovery is to promote the fact-finding process and thereby protect the defendant against surprise, unfairness, and inadequate preparation. (*People* v. *Rayford* (1976), 43 Ill. App. 3d 283, 356 N.E.2d 1274; see also *People* v. *Shegog* (1976), 37 Ill. App. 3d 615, 346 N.E.2d 208.) Supreme Court Rule 412(f) (Ill. Rev. Stat. 1977, ch. 110A, par. 412(f)) states that:

> "The State should ensure that a flow of information is maintained between the various investigative personnel and its possession or control all material and information relevant to the accused and the offense charged."

The failure to disclose which occurred below cannot be excused by the argument that the Assistant State's Attorneys were unaware of the statement's existence, since they and the police are required to cooperate and insure that all relevant information will be provided and that discovery will be accomplished. (*People* v. *Young* (1978), 59 Ill. App. 3d 254, 375 N.E.2d 442.) The required flow of information obviously broke down in this case and the goal of pre-trial discovery was not met. The proper remedy for that breakdown is a new trial. Because we reverse defendant's conviction and remand for a new trial, we do not comment on his remaining contentions.

Reversed and remanded.

MEJDA and WILSON, JJ., concur.

APPENDIX B

APPENDIX B

ILLINOIS SUPREME COURT
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May 31, 1979

Ms. Marcia Orr
Asst. State's Attorney
Criminal Appeals Division
500 Richard J. Daley Center
Chicago, Ill. 60602

No. 51918 - People State of Illinois, petitioner, vs. John J. Trolia, respondent. Leave to appeal. Appellate Court: First District.

The Supreme Court today denied the petition for leave to appeal in the above entitled cause.

Very truly yours,

Clell L. Woods

Clerk of the Supreme Court